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THE RULE IN SHELLEY'S CASE IN PENNSYLVANIA.

The Rule in Shelley's Case is one of the most ancient and renowned in the law of real property. Although the earliest instance of its application is to be found in the year 1326,¹ and several instances occur during the reign of Edward III, and also during the succeeding centuries, yet it was not until the twenty-third year of the reign of Elizabeth (1579) that the case arose which gave the rule its familiar appellation.² As Mr. Hargrave, who was one of the editors of Coke-Littleton, tells us, it was due to the circumstance that the report of Shelley's Case by Lord Coke, who argued the case for the defendant, contains the best known depository of the rule and also the fullest and most correct expression of the doctrine meant to be conveyed, that, for the sake of shortness, lawyers and judges have in all succeeding times spoken of it as the Rule in Shelley's Case.³

The rule, as reported by Coke, is as follows:—"That when the ancestor by any gift or conveyance takes an estate of *freehold*, and in the *same* gift or conveyance an estate is limited either *mediately or immediately* to his heirs in fee, or in tail, *always* in such cases *heirs* are words of *limitation* of the estate, and *not* words of *purchase*."

Just before the outbreak of the American Revolution, the case of *Perrin v. Blake* arose, in which Lord Chief Justice Mansfield, supported by two of his colleagues, Aston and Willes, held that the intention of a testator, if clearly expressed, could control the rule, while Justice Yates, the sole dissident, held that a rule of law could not be destroyed by a testator. In the Exchequer Chamber the judgment of the King's Bench was reversed, and it is interesting to note that the opinion of Blackstone, sitting as a member of the Appellate Court, was opposed

¹ Year Book, 18th Edw. II, fol. 577, Sergeant Maynard's Edition.

² Shelley's Case, 1 Coke's Rep. 94-104.

³ Hargrave: Jurisconsult Exercitations, Vol. III, p. 317.

to that of Mansfield. The case, while carried to the House of Lords, was never finally decided because of a compromise between the parties, and the opposing views of men as famous as Mansfield and Blackstone have furnished to later disputants their chief weapons of attack and defence.⁴

Mr. Hargrave made the matter the subject of the most elaborate examination in his "Observations upon the Rule in Shelley's Case."⁵ He was recognized as the most resolute and learned champion of the rule, and any close student of his book, on comparing his views and arguments with what was subsequently written by our own judges, cannot fail to perceive how profoundly he has affected the views of our own Supreme Court. In fact, a perusal of his book would form a most useful introductory study, and aid in the complete consideration of our own cases.

The earliest case in Pennsylvania is that of *Jones' Claim*.⁶ Two of the Judges sitting in that case, Chief Justice McKean and Justice Yeates, had studied law in the Temple Inns of Court in London, and this may account in part for the masterly ease displayed in the disposition of the matter. The devise was to "John Parrock during the term of his natural life, and if he leaves lawful issue, then I give my real estate to such issue. But in case of his dying without issue, or they dying under the age of twenty-one years, then I devise all my real estate unto Abel James." Parrock was attainted of treason, and James filed a claim to save his rights. The Court said concisely:

"The word 'issue' in this case is a word of limitation, and John Parrock took an estate tail. . . . Probably, indeed, no more than an estate for life was intended to have been given to him, but the law supervenes this intention."

⁴ There is no separate or full report of the case of *Perrin v. Blake*. It must be studied in separate publications. See 1 Wm. Blackstone's Rep., p. 672; 4 Burrow's Rep., pp. 257-9; Douglas' Rep., 3rd ed., p. 343 in note; but for the fullest discussion, see *Collectanea Juridica*, Vol. I, p. 283, *et seq.*, and Blackstone's Argument in the Exchequer Chamber, Hargrave's Law Tracts, p. 489, *et seq.*

⁵ Jurisconsult Exercitations, Vol. III, p. 317.

⁶ 1 Dallas, 47 (1780), occurring, it will be noticed, ten years after *Perrin v. Blake* arose in Westminster Hall.

Thus at the very outset, the views of the Court of Exchequer Chamber in *Perrin v. Blake* were adopted as the basis of Pennsylvania law. The rule could not be destroyed by the will of a testator. In the later case of *Lessee of John Baughman v. Christian Baughman*⁷ it is evident that Mr. Hargrave's "Observations" had reached our shores, for Justice Yeates and Justice Smith both quote copiously; giving particular emphasis to the assertions: "The Rule in Shelley's Case is nothing more than a negative upon an indirect mode of introducing a real heir in the assumed form of a purchaser," and again: "It should not be mistaken as a rule for spelling out and executing private intention, but recognized as a check to restrain private intention from levelling the distinctions of inheritance."

In 1810, the leading case arose of *Findlay's Lessee v. Riddle*.⁸ It might almost be regarded as a rehearing of *Perrin v. Blake*, so frequent were the references at the bar and on the bench to what had taken place in that famous controversy. It is true that the rule was not applied, as the determination was in favor of a life estate only to the first taker, and the remainder was given to "heirs" in a restricted or definite sense, but the old learning of the books and ancient sages, as well as of Blackstone and Hargrave, were so exhaustively discussed, that it was clear that our judges did not consider the rule a part of "the rubbish of the dark ages."

During the next forty years the rule was steadily maintained, although frequently assailed, but received a masterly and conclusive vindication by Chief Justice Gibson in the case of *Hileman v. Bouslaugh*.⁹ He declared:

"The Rule in Shelley's Case ill deserves the epithets bestowed on it in the argument. Though of feudal origin it is not a relic of barbarism. . . . It is part of a system; an artificial one, it is true, but still a system, and a complete one. . . . It happily falls in with the current of our policy. By turning a limitation for life, with remainder to heirs of the body, into an estate tail, it is the hand-maid, not only of Taltarum's case, but of our statute for

⁷ 2 Yates, 410 (1798).

⁸ 3 Binney, 139 (1810).

⁹ 13 Pa. 344 (1850).

barring entails by a deed acknowledged in court, and where the limitation is to heirs general, it cuts off what would otherwise be a contingent remainder, destructible only by common recovery."

After referring by name to Mr. Hargrave, Mr. Justice Blackstone, Mr. Fearn, Chief Baron Gilbert, Lord Chancellor Parker, Lord Mansfield, and Mr. Hayes, thus showing how deeply he had read the English authorities, he pointedly adopts the striking sentence of Hargrave: "that to engraft purchase on descent, would produce an amphibious species of inheritance, and confound a settled distinction in the law of estates." He then disposes of the objection relied on by Mansfield, and which has stuck like a burr in the minds of every opponent of the rule ever since, and which persistently crops up to this day in spite of repeated judicial efforts to exterminate it, the objection based on the intention of the testator. He says:

"It is admitted that the rule subverts a particular intention in perhaps, every instance, for as was said in *Roe v. Bedford*, 4 Maule and Selw. 363, it is proof against even an express declaration that the heirs shall take as purchasers. But it is an intention which the law cannot indulge consistently with the testator's general plan, and which is necessarily subordinate to it. It is an intention to create an inalienable estate tail in the first donee; and to invert the rule of interpretation, by making the general intention subservient to the particular one. A donor is no more competent to make tenancy for life a source of inheritable succession, than he is competent to create a perpetuity, or a new canon of descent. The rule is too intimately connected with the doctrines of estates, to be separated from it without breaking the ligaments of property."

This celebrated vindication of the rule by Gibson has always been regarded as conclusive. In *George v. Morgan*¹⁰ Justice Bell displays his impatience with contention. He says:

"The Rule in Shelley's Case has been so repeatedly recognized as a feature of our law, that further discussion is precluded. . . . No influence is to be conceded to any supposed prohibition of the rule by the testator, or to the defeat of a particular intention by its interposition."

Then came Chief Justice Black in *Auman v. Auman*:¹¹

"We encounter here again the argument so often met in cases

¹⁰ 16 Pa. 95 (1851).

¹¹ 21 Pa. 343 (1853).

like this, namely, that we will defeat the intention of the grantor if we give the first takers a fee. I think it very probable, nay almost certain, that the grantor meant to give no more than a life estate. . . . But if such was his intent, it must be overruled by the legal construction of the words. The very purpose and object of the Rule in Shelley's Case is to control such intentions, and (in all cases properly within it) to substitute a totally different operation from that designed by the donor."

Then came a remarkable judicial somersault. Gibson being in his grave, and Black having resigned to take a Cabinet position, the Supreme Court yielded to the theorizing and reforming tendencies of Mr. Justice Lowrie, who mischievously upset the law of trusts¹² and proceeded to do the same thing with the Rule in Shelley's Case, forgetting that it is the part of the judiciary to declare the law, and that it is not a judicial function to inject social theories into Supreme Court decisions.

In *Williams v. Leech*¹³ and *Price v. Taylor and Wife*,¹⁴ Justice Lowrie, after stating a series of hypotheses, attempted to readjust the law. A vain effort. In *Guthrie's Appeal*¹⁵ at the hands of Mr. Justice Strong, the vagaries of Lowrie were suffocated, and the Rule in Shelley's Case was released from the chord that had been drawn around it. *Guthrie's Appeal* has been considered by some as though it were an original authority. For practical purposes it may be so regarded, if there is to be a time limit upon the citation of authority, but historically considered it is only a restoration of what Mr. Justice Woodward called "the old law." That the restoration was complete is apparent from the words of Mr. Justice Sharswood, himself a master of the Common Law fit to rank with Gibson and Strong, in *Kleppner v. Laverty*:¹⁶

"Even, therefore, though there should be an estate for life in express terms, and a devise to issue in remainder on the death of

¹² See *Kuhn v. Newman*, 26 Pa. 230 (1856), and *Kay v. Scates*, 37 Pa. 31 (1860), both overruled in *Barnett's Appeal*, 46 Pa. 392 (1864).

¹³ 28 Pa. 89 (1856).

¹⁴ 28 Pa. 95 (1856). The poison was again injected in *Naglee's Appeal*, 33 Pa. 89 (1859); and *McKee v. McKinley*, 33 Pa. 92 (1859); and was not expelled until *Guthrie's Appeal*, 37 Pa. 1 (1860).

¹⁵ *Ut supra*, note 14.

¹⁶ 70 Pa. 70 (1871).

the tenant for life, either expressly or by implication only, as by a devise over for want or in default of issue, unless there is something to contradict unequivocally the presumed intention that the devise over shall not take effect until the whole line of issue is extinct, the rule of law is an unbending one, which vests the inheritance in tail in the first taker. The particular intent must give way to the general one. The Rule in Shelley's Case is not a rule of construction—not the means of ascertaining the intention of the testator. It presupposes that intention to be ascertained. It is a rule of law which declares inexorably that where the ancestor takes a preceding freehold by the same instrument, whether by deed or will, a remainder shall not be limited to his heirs as purchasers.”

Even superadded words of limitation to the devise to the issue—“to them, their heirs and assigns forever”—make no difference. These superadded words do not make the “heirs” the root of a new succession. As Justice Kennedy had shown in *Paxson v. Lefferts*,¹⁷ on the authority of Fearn, superadded words of limitation, if not inconsistent with the nature of the descent (pointed out by the first words) will not convert them into words of purchase.¹⁸ It is only where the superadded words of limitation contain a *distributive modification* that the words “heirs” or “issue” or “heirs of the body” can be read in a restricted sense. This appears from the case of *Robins v. Quinliven*.¹⁹ There Mr. Justice Williams said:

“The gift of the remainder is not to the issue alone, but to the issue and their heirs forever, in the proportions to which they would be entitled, under the intestate laws of Pennsylvania, respectively; that is to say, in equal shares as tenants in common. The limitation to the heirs general of the issue, with the superadded words of distributive modification, clearly shows that by issue, the testator meant children and intended that they should take the remainder as purchasers and not as heirs by descent.”

For a time it was thought that this case had modified the Rule in Shelley's Case, and there was much commotion over the first opinion of the Supreme Court in the twice argued, and twice decided case of *Carroll v. Burns*.²⁰ The Court at first

¹⁷ 3 Rawle, 59 (1831).

¹⁸ Kleppner v. Laverty, *supra*, note 16.

¹⁹ 79 Pa. 333 (1875).

²⁰ 108 Pa. 387 (1885).

held that the Robins case was the same as the Carroll case. On the second hearing this decision was overruled. The devise in the Carroll case was to daughters for life, and "after their death then to the lawful issue of my said three daughters and the heirs and assigns of such issue." It had been argued at bar that these words gave the first takers, the daughters, but a life estate, and it was so held in a *per curiam* opinion, that the word "issue" meant "children," and hence that the "issue" took as purchasers; and the subsequent clause "heirs and assigns of such issue," were words of distributive modification. On a sturdy protest from the bar, the Court was induced to reconsider the case, and this view was abandoned. Judge Trunkey, speaking for the majority of the Court, declared that the superadded words of limitation were not words of distributive modification. "The clause in the will where 'such' is used, is the equivalent for issue and their heirs."

From that day to this there has been no judicial wavering in the application of the rule. There have been numerous cases, and the old objections have appeared again and again until the matter has become stale. But in every instance where the Court has been satisfied that the words "heirs," "heirs of the body," "issue," "children," or other similar expressions were used in the technical sense of heirs, or as importing an indefinite failure of issue, the rule has been unhesitatingly upheld. On the other hand where it was clear that even the word "heirs" was used in a restricted sense so as to be equivalent to the *prima facie* meaning of the word "children" as importing a definite failure of issue, the rule has been held to be inapplicable.

It would serve no useful purpose in a paper of this character to multiply instances. The following must suffice to show how fully the rule exists in this state. In *Basset v. Hawk*,²¹ Chief Justice Gordon said:

"But it is useless to multiply authorities, for unquestionably, Shelley's case governs the controversy in hand, and that is the end of the matter. . . . It would be a very serious breach of our judicial duty to even hesitate to enforce it."

²¹ 118 Pa. 94 (1888).

In *Sheeley v. Neidhammer*,²² Justice Williams said:

"It is a highly artificial rule of construction (*sic*) applied without regard to the actual purpose of the testator. Its wisdom is a question about which lawyers and judges differ, but it is too thoroughly imbedded in the law of this state to justify courts in departing from it."

In *Shapley v. Diehl*,²³ Justice Mitchell said:

"The Rule in Shelley's Case is a rule of law, not of construction, and where a case falls within it, it applies inexorably without reference to intent."

This doctrine was affirmed, almost in the same words, by Mr. Justice Mestrezat in the very recent case of *Ahl v. Liggett*.²⁴

Cases in which the rule was not applied, because of the use of technical words so qualified by subsequent provisions in the will as to indicate the restricted sense in which they were meant, or by the use of words in themselves importing a definite failure of issue, and standing without subsequent words to enlarge their meaning, are represented by the following: *Giffen's Estate*,²⁵ *Pierce, et al. v. Hubbard*,²⁶ *Nes v. Ramsay*,²⁷ *McCann v. McCann*,²⁸ *Kemp v. Reinhard*,²⁹ *Chambers v. Union Trust Co.*³⁰ and the very recent cases of *Stout v. Good*,³¹ and *Lea v. Sanson*,³² in both of which Mr. Justice Moschzisker very fully and ably discusses the distinctions which make the rule inapplicable, and, in the case of *Harrison v. Harris*,³³ presents the conditions which call for the application of the rule. The consecutive reading of the three last mentioned cases will be found of service.

²² 182 Pa. 163 (1897).

²³ 203 Pa. 566 (1902).

²⁴ 246 Pa. 246 (1914).

²⁵ 138 Pa. 327 (1890).

²⁶ 152 Pa. 18 (1892).

²⁷ 155 Pa. 628 (1893).

²⁸ 197 Pa. 452 (1900).

²⁹ 228 Pa. 143 (1910).

³⁰ 235 Pa. 586 (1912).

³¹ 245 Pa. 384 (1914).

³² 245 Pa. 392 (1914).

³³ 245 Pa. 398 (1914).

What Mr. Justice Dean in *Simpson v. Reed*³⁴ called "a concise and axiomatic discussion" is to be found in *Shapley v. Diehl*³⁵ from the accomplished pen of Mr. Justice Mitchell:

"In determining whether the Rule in Shelley's Case is applicable, the test is how the donees in remainder are to take. If as purchasers under the donor then the particular estate is limited by the literal words of the deed and the Rule in Shelley's Case has no application. But if the remaindermen are to take as heirs to the donee of the particular estate, then what has been called the superior intent as declared in Shelley's case operates and the first donee takes a fee, whatever words may be used in describing the estate given to them."

It remains in closing this outline sketch of the rule, to call attention to the Act of July 9th, 1897,^{35a} by which it was enacted:

"That in any gift, grant, devise or bequest of real or personal estate, the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the death of such person and not indefinite failure of his issue, unless a contrary intention shall appear by the deed, will or other instrument in which such gift, grant, devise or bequest is made or contained."

The constitutionality of this act was sustained, and its purpose stated in *Dilworth, Appellant v. Schuylkill Land Company*.³⁶ So too, Mr. Justice Mitchell in *Lewis v. Link Belt Company*,³⁷ said that this act

"changed the presumption which formerly was in favor of an indefinite failure of issue, and substituted a statutory presumption that, in the absence of words indicating a contrary intent, a definite failure is to be presumed. This is in accordance with the actual intent in the vast majority of cases, and is a legislative step in the direction in which this court has been tending, to restore to its proper place the cardinal rule that actual intent is to prevail."

It will be observed that the act does not in any way modify

³⁴ 205 Pa. 53 (1903).

³⁵ 203 Pa. 566 (1902).

^{35a} P. L. 213.

³⁶ 219 Pa. 527 (1908).

³⁷ 222 Pa. 139 1908.

the Rule in Shelley's Case. The act simply operates upon the preliminary inquiry what did the testator mean by the words he used, and if the words used in a will are those quoted in the statute, standing alone, their legal meaning is fixed by the statute as importing a definite failure of issue, which would render the rule inapplicable. But it is quite clear, if the writer of this paper may hazard an opinion in the absence of judicial decisions, that the act leaves it entirely open to judicial construction of the words used, if the will should contain other words which might vary the meaning imputed by the statute; and it would seem to follow that if a court should conclude that the testator meant to use the words in the sense of an indefinite failure of issue, the judicial duty is to apply the Rule in Shelley's Case inexorably, just as a court is bound to apply the rule where the technical word "heirs" or "heirs of the body" standing alone must be accepted in the strict sense of inheritable succession *ad infinitum*.

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